

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1147

To be argued by
Irving Anolik

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD RIZZO, NICHOLAS BOTTA, LAWRENCE
MESSINA, JOHN YARMOSH, JOHN IANNONE,
IRVING ALBAHARI, JOSEPH FALCO, DAVID
STEINBERG,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

**Joint Brief of Defendants-Appellants, John Iannone and
Irving Albahari.**

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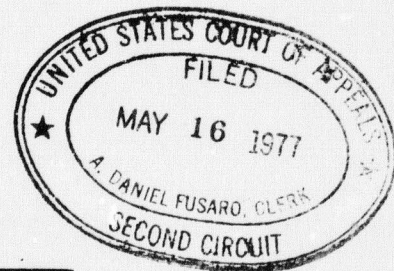


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UNITED STATES OF AMERICA,

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RICHARD RIZZO, NICHOLAS BOTTA, LAWRENCE MESSINA, JOHN
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FALCO, DAVID STEINBERG,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

- - - - -X

JOINT BRIEF OF DEFENDANTS-APPELLANTS, JOHN IANNONE
AND IRVING ALBAHARI.

STATEMENT.

Defendants-appellants Albahari and Iannone appeal from a judgment of the United States District Court for the Southern District of New York, rendered the 14th day of March, 1977, convicting each of them of conspiracy to violate 18 U. S. C. 1955, and of one substantive charge of actual violation of that section, after trial before Weinfeld, D.J., and a jury. Albahari was sentenced to six months incarceration and a period of two

years probation thereafter, and Iannone to one year imprisonment but both are presently at liberty on bail pending the determination of this appeal.

INTRODUCTORY.

It is anticipated that there will be one or more other briefs that will be filed by other appellants in connection with the case at bar. So far as relevant to the appellants herein, they jointly and respectively adopt the points contained in the briefs of any co-appellants.

This case involved a so-called gambling syndicate operating in east Harlem. The prosecution relied very heavily upon electronic surveillance by way of recording telephone conversations among various defendants at trial.

We do not believe it will be contested that but for this electronic surveillance, it is not likely that a conviction could have been obtained against those defendants who were ultimately convicted.

This electronic surveillance was the subject of a motion to suppress, which we submit the Court below erroneously denied in view of the fact that there had been a failure to seal the tapes immediately.

While it is true that the Government had a co-conspirator by the name of Robert Breindel, who testified substantially against the appellants herein, it must be borne in mind that he was an accomplice and co-conspirator and, therefore, his testimony had to be viewed with caution and suspicion.

The evidence against Albahari consisted virtually exclusively upon the testimony of Breindel. There was no recorded telephone conversation introduced into evidence containing the voice of Albahari.

Initially, Albahari had been referred to in the first indictment as a person known as "Brooklyn." It later was conceded that this appellation was in error since his nickname was "AC", and a superceding true bill was filed.*

There was, no doubt, a good deal of confusion in the minds of the grand jurors, and certainly in the minds of the petit jurors, with respect to "Brooklyn."

John Iannone was the subject of a recording, but of an extremely short duration. Iannone, according to the prosecution, used the alias "Kodak."

Significantly, Breindel, upon whose testimony the prosecution relied very heavily, was unable to identify

* Incredibly, there was no arraignment on the superceding indictment and thus we maintain the Court lacked jurisdiction.

a photograph of Iannone. With some difficulty, Breindel did identify Albahari from a photograph, although he admitted that initially it took him about a full minute to do so, but that subsequently he was able to do so immediately.

The prosecution admitted that there were really four or more separate groups of people that were involved in this gambling operation. Iannone and Albahari were runners. For example, other than Breindel and his group, it was admitted that bets were "laid off" to a so-called "Mr. White" group headed by Mike Botta and John Yarmosh; the "Commander" operation headed by Nich Renna, and the "National" operation conducted by Joseph Falco. Esposito and Dixon were separate operations.

A perusal of the record reveals that although there was interplay amongst these individuals through laying off bets and whatnot, there were really over four distinct operations and, consequently, over four separate conspiratorial cabals, and by no means one single conspiracy.

This case, therefore, should have been severed as was requested by counsel for the appellants, particularly in view of the fact that the Court was told that Albahari and Iannone needed the testimony of the co-defendants David Steinberg and Richard Rizzo in their

defense. With Steinberg and Rizzo as co-defendants, however, it was of course impossible to call them.

We shall not dwell too greatly upon the facts of the case since the Government necessarily must concede that the electronic tapes and Breindel's testimony were their principal weapons against Iannone, and that with respect to Albahari, Breindel alone was the fount of his inculcation.

As a matter of fact, it is our contention that under the principles of such cases as *United States v. Taylor*, 464 F. 2d 240 (2d Cir. 1972), the Court should not even have permitted Albahari's matter to go to the jury because of the quality and quantity of evidence against him.

Finally, it is contended that the Trial Judge prejudiced the defendants-appellants herein by his unfortunate reference to organized crime and by the confusion over the aliases "Brooklyn" and "Kodak."

We submit the aliases should never have been permitted to be used.

THE EVIDENCE AT TRIAL.

The main witness at trial was a self-confessed gambler, loan shark and all-around criminal, Robert Breindel, who was given immunity to testify at this trial. He had testified three or four times previously under similar circumstances (138, 139-140).

It was Breindel who was primarily responsible for the conviction of Iannone and exclusively for the verdict against Albahari.

Breindel said that he had met Albahari about five or 10 times and identified him as a runner. He admitted however, that he had difficulty recognizing Albahari in a photo, but that in the trial he was sure who he was (71-73).

Although the original indictment described Albahari as a person known as "Brooklyn," it was later corrected to that as a person called "AC" or "ACME" (101-103).

(See Point III, *infra*.)

Breindel said he met Iannone through Albahari (104-05). He recalled that Iannone used the code name "Kodak" and that he dealt with Kodak via Albahari (105).

Ironically, Breindel could not recognize Iannone's picture at all (108). He identified a taped conversation of about 28 words between Iannone and Rizzo (112-113). This took place on June 14, 1975 (121).

FBI agent Richard Nalley testified that he heard co-defendant Falco's voice 50 times (199). It turned out however that this remarkable fact was due to his having listened to a great number of tapes which were suppressed in the case of *United States v. Gigante*, 75 Cr. 94 (538 F. 2d 502 - *aff'd*). For this reason, the court ordered

the testimony stricken, and allowed only that portion where personal conversations were involved with Falco, which numbered only about three times (199-204). (In the charge upon request of the jurors during deliberations, the Court reporter re-read the stricken portions, but a motion for mistrial was denied [612-613].)

It should be noted that an objection by one counsel was understood to be for all (92).

FBI Agent Robert Walsh testified that when he debriefed Breindel, the latter identified "Brooklyn" as being Albahari. Briendel was not clear as to whether Iannone was Kodak, but only called him "Johnny" (240-242, 249-252).

Daniel Kramer, who also received immunity, testified as to the operation and the techniques of gambling operations (265, 272, 283).

Nicholas Gianturco of the FBI also testified as a gambling expert and identified Gov't Exhibit 4-c, a tape, as containing the voice of Iannone, only 28 words (454-55). Iannone had given voluntary voice exemplars (434).

THE TAPE SUPPRESSION HEARING CONSIDERED.

The Court below conducted a suppression hearing because of failure to immediately seal the tapes which were obtained with court authorized wiretaps. There were

two orders. The first order which was signed by Judge Palmieri began on June 11, 1975, and on June 15, 1975 it was learned that the location of this tap was being abandoned. There had already been sufficient recordings, however, to achieve the object of the tap (H-89-93).

Notwithstanding this fact, the tap remained until the 23rd of June, 1975, during which eight-day interval no calls were recorded. Then the government finally decided to submit the tapes for sealing and on the 24th of June, this finally was accomplished (H-88-93).

There ~~was~~ no explanation why the tapes were not sealed on the 15th or 16th of June, except that AUSA Abzug said that he wanted to determine if the old wire room would in fact remain closed (H-94-96).

Suppression was denied (115).

POINT I.

THE COURT BELOW SHOULD HAVE SUPPRESSED THE ELECTRONIC RECORDINGS OF TELEPHONE CONVERSATIONS OBTAINED BY COURT ORDER BECAUSE THE GOVERNMENT FAILED TO SEAL THEM "IMMEDIATELY" UPON THE ACHIEVEMENT OF THE OBJECT OF THE WIRETAPPING AND, CONSEQUENTLY, VIOLATED THE LETTER AND SPIRIT OF TITLE III OF THE OMNIBUS CRIME CONTROL ACT (18 U. S. C. 2510-2520).

The evidence adduced at a hearing which the Court conducted prior to trial revealed that the tapes of wire-taps were not sealed immediately upon the achievement of the object of that surveillance.

Agent William Bradbury, Jr., testified with respect to the electronic surveillance and how it was conducted.

The Government conceded that the "immediacy" requirement of the statute was not complied with.

The prosecution maintained that it was aware of the fact that the so-called "old" wire room was closed after the 15th of June, 1975. No recordings whatsoever were obtained therefrom between June 16th and June 23rd. Notwithstanding this fact, no effort was made to seal the tapes obtained between June 11th and June 15th. There was thus an eight-day hiatus prior to the submission of the tapes for sealing (H-92-95).*

With respect to the second group of tapes, there was also a delay, but of a shorter period, allegedly due to the fact that the Government had been unable to duplicate the originals as fast as they had hoped (85-95).

Certainly with respect to the first group of tapes where there was an unexplained eight-day hiatus, suppression should have been granted.

We say "unexplained," although we realize that the prosecutor, Mr. Abzug, stated that he apparently wanted to make sure that there would be no further conversations over the taps at the old wire room location.

* Numerals in parentheses with the prefix "H" refer to pages of the official court reporter's minutes of the suppression hearing. Where numerals are used without any prefix, they refer to pages of the official court reporter's minutes of trial.

This explanation, of course, was fatuous, to say the least, since the tape recordings previously obtained revealed that there was no further activity and would be none at that location and certainly after a day or two it was manifest that the wire was dead.

In addition, the object to the taps had already been achieved, so there was no purpose, in any event, to keep the wire open.

In *United States v. Gigante* (2d Cir. 1976), 538 F. 2d 502, a failure to comply strictly with the immediacy requirements of 18 U. S. C. 2510-2520, was deemed fatal and required suppression of the evidence.

Consistent with this approach is *People v. Sher*, 38 N. Y. 2d 600, and *People v. Nicoletti*, 35 N. Y. 2d 249.

This Court, in *Gigante*, specifically distinguished the Third Circuit's opinion in *United States v. Falcone*, 505 F. 2d 478, cert. den. 420 U. S. 955.

See also, the dissent in *United States v. Giordano*, 416 U. S. 505, and *United States v. Chavez*, 416 U. S. 562.

The requirements of Section 2518(8)(a) were not met and this is unquestionably a basis for suppression of the recorded evidence.

In *United States v. Gigante*, *supra*, this Court explained:

"We recently had occasion to observe that Congress, in enacting Title III's sharply detailed restrictions on electronic surveillance, intended to 'ensure careful judicial scrutiny throughout' the process of intercepting and utilization of such evidence. *United States v. Marion*, No. 75-1408 (2d Cir. May 7, 1976), pp. 3567, 3568.

"The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of this statutory scheme. Section 2518(8)(a) was intended 'to insure that accurate records will be kept of intercepted communications.' S. Rep. 1097, 90th Cong., 2d Sess., *quoted in* 2 U. S. Code Cong. & Ad. News, 2193 (1968). Clearly all of the carefully planned strictures on the conduct of electronic surveillance, *e.g.*, the 'minimization' requirement of §2518 (5), would be unavailing if no reliable records existed of the conversations which were, in fact, overheard. Maintenance of the integrity

of such evidence is part and parcel of the Congressional plan to 'limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.' *United States v. Giordano*, 416 U. S. 505, 527 (1974). Moreover, it plays a 'central role in the statutory scheme.' *Id.* at 528. See also, *United States v. Chavez*, 416 U. S. 562 (1974).

"The Government has conceded that the requirements of §2518(8)(a) have not been met. Nor is it disputed that failure to comply with that subsection is a ground for suppression of recorded evidence.⁵ Rather, the Government argues that this is not a case where the 'Draconian' sanction of suppression is warranted, since the appellees have been unable to present any evidence of actual tampering with the tapes.

"To demand such an extraordinary showing, however, would vitiate the Congressional purpose in requiring judicial supervision of the

5. In light of our holding today that §2518(8)(a) offers an independent basis for excluding the evidence from trial, we need not consider whether the tapes are also rendered inadmissible by §2518(10)(a), the general provision of the Act.

sealing process. Tape recorded evidence is uniquely susceptible to manipulation and alteration. Portions of a conversation may be deleted, substituted, or rearranged. Yet, if the editing is skillful, such modifications can rarely, if ever, be detected. The judicial sealing requirement, therefore, provides an external safeguard against tampering with or manipulation of recorded evidence. The sealed tapes become 'confidential court records'⁶ and cannot be unsealed in the absence of a subsequent order. When these safeguards are compared with the haphazard procedures employed in this case, the wisdom of Congress becomes manifest.

"Moreover, the plain language of the statute requires that this evidence be suppressed. Section 2518(8)(a) states, *inter alia*, that:

"The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the

6. S. Rep. 1097, 90th Cong., 2nd Sess., quoted at 2 U. S. Code Cong. & Ad. News p. 2193 (1968).

contents of any wire or oral communication or evidence derived therefrom * * *.'" (Emphasis supplied.)

The arguments made in *Gigante* will no doubt be made herein since it is the same Strike Force that was involved in *Gigante* as herein as well. As a matter of fact, the agents who testified herein admitted that they were able to make a voice identification in part because of having listened to suppressed tapes in *Gigante*.

We also maintain that there has been no satisfactory explanation for the delay, as was the case in *United States v. Poeta*, 455 F. 2d 117 (2d Cir.), cert. den. 406 U. S. 998 (1972). The lame excuse that the Government wanted to determine whether or not the "old" wire room would become active, might have justified a day or two delay, but not eight days.

The further argument that the order by its terms did not expire until July 1st, is also not cogent because in the area of electronic surveillance wherein the strictest standards are required, as *Gigante* points out, it is not enough that the prosecutor argued that the order expires on July 1st -- He must recognize that the order requires an immediate secession of interception followed by immediate sealing of the tapes acquired when

the object of the tapping has been achieved or when the wiretap itself can no longer serve a purpose.

Under the circumstances, for this reason alone a reversal is warranted.

POINT II.

THE STATUTE INVOLVED HEREIN, 18 U. S. C. 1955, INVOLVES THE NECESSITY OF FINDING THAT FIVE OR MORE PERSONS UNLAWFULLY, WILFULLY, AND KNOWINGLY DID "CONDUCT, FINANCE, MANAGE, SUPERVISE, DIRECT AND OWN AN ILLEGAL GAMBLING BUSINESS * * *." THE JURY, HOWEVER, WAS NOT SPECIFICALLY TOLD WHICH FIVE PERSONS WERE DIRECTLY ATTRIBUTABLE TO THE RESPECTIVE APPELLANTS HEREIN AND, CONSEQUENTLY, THERE MAY WELL HAVE BEEN A DEFECTIVE VERDICT SINCE THE JURORS COULD HAVE BEEN LESS THAN UNANIMOUS, NOT ONLY WITH RESPECT TO THIS COUNT, BUT WITH REGARD TO THE CONSPIRACY CHARGE AS WELL, WHEREIN THE SAME PROBLEM EXISTS EXCEPT THAT TWO OR MORE PEOPLE NEED BE INVOLVED. ONLY FOUR WERE ON TRIAL.

In the case at bar, the statute, 18 U. S. C. 1955, requires that five or more people conjoin to violate the statute. Neither the charge of the Court nor the verdict of jury specifically indicates that the jurors had to find any specific five persons necessary to satisfy the requirements of the statute with respect to each of the appellants herein.

Since less than five people were involved in the trial of the case, it may well be that the jurors found different sets of five people and, consequently, were not unanimous in their verdict. Thus, in *United States v. Natelli*, 527 F. 2d 311, (2d Cir. 1975), cert. den.

U. S. , this Court held that where specifications in a single count might relate to more than one fact pattern unless supported in all possible ways, the conviction cannot stand.

Time and again this Court has reversed convictions for failure to define adequately the legal principles involved, particularly where people are allegedly acting in some joint enterprise (*United States v. Terrell*, 474 F. 2d 872 [2d Cir. 1973]; *United States v. Byrd*, 352 F. 2d 570 [2d Cir. 1965]; *United States v. Garguilo*, 310 F. 2d 249 [2d Cir. 1962]). See, also, *United States v. Bryant*, 461 F. 2d 912 (6th Cir. 1972).

Where a jury may have convicted on an unproved specification, a new trial should be granted, as held in *Yates v. United States*, 354 U. S. 298, 312 (1957), where the Court stated:

"We think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is important to tell which ground the jury selected."

See also, *Stromberg v. California*, 283 U. S. 359, 367-68 (1930), and *Street v. New York*, 394 U. S. 576, 585-86 (1969).

This principle has not been limited to cases involving constitutionally invalid statutes, as the Government had suggested in its unsuccessful argument in *United States v. Natelli*, *supra*.

In *United States v. Guterma*, 281 F. 2d 742, 747 (2d Cir. 1960), this Court reasoned:

"The two prosecutions were submitted to the jury together and we cannot know whether their verdict was based solely on the UFITEC transaction or in part or solely on the Judson Commercial sale."

See, also, *United N. Y. & N. J. Sandy Hook Pilots Assn. v. Halecki*, 358 U. S. 613, 619 (1959), and *United States v. Driscoll*, 449 F. 2d 894, 898 (1st Cir. 1971).

Thus basic error was perpetrated.

POINT III.

APPELLANT ALBAHARI WAS NEVER ARRAIGNED ON HIS INDICTMENT, NOR WAS HE GIVEN AN OPPORTUNITY TO ADDRESS MOTIONS THERETO. ACCORDINGLY, THE JUDGMENT AS TO HIM IS VOID SINCE THE COURT ACQUIRED NO JURISDICTION.

At 464 and 465 of the record it becomes obvious that Albahari was not aware that there had been a material change in the allegations against him by a superceding indictment.

Albahari's attorney moved to dismiss the indictment at the end of the government's case and for the first time learned that it had been superceded,* and in the new true bill, the appellation "Brooklyn" as to Albahari had been eliminated. The trial court declared that it had ordered a plea of "not guilty" to be entered, but defense counsel and Albahari were unaware of it. They were never told of an arraignment and no opportunity to make motions was afforded (F. R. Crim. Pro. Rules 6, 7, 10, 11).

An arraignment must take place in open Court and is an important step in a federal case (Rule 10, F. R. Crim. Pro.; *Hamilton v. Alabama*, 368 U. S. 52, 54, n. 4; *McConnell v. United States*, 5th Cir. 1967, 375 F. 2d 905, 909; *Anderson v. United States*, D. C. Cir. 1965, 352 F. 2d 945, 946; *Sweeney v. United States*, 9th Cir. 1969, 408 F. 2d 121).

The entire thrust of the defense may have been affected by this incredible error by the Court and prosecutor. It is obvious that the defense thought that it must shake the prosecution on the identity of "Brooklyn."

* Defense counsel had learned of a contemplated superceder but no one ever told him it had come down.

The whole thrust of the defense would possibly have been changed if he knew of the new indictment. The attack in cross was on the identity of "Brooklyn."

This was clearly not so, since the new indictment eliminated that appellation, but this fact was kept from Albahari. It is also manifest that a copy of the indictment was not served on him or his lawyer.

No opportunity to make motions was afforded and thus due process was denied on that score as well. We maintain that the court did not acquire jurisdiction of Albahari since he did not waive arraignment and no effort was made to apprise him of it.

POINT IV.

THE EVIDENCE ADDUCED REVEALED AT LEAST FOUR SEPARATE CONSPIRACIES RATHER THAN A SINGLE CONSPIRACY AND THUS SUFFERED FROM THE FATAL DEFECT OF VARIANCE. ACCORDINGLY, THE INDICTMENT SHOULD HAVE BEEN DISMISSED.

In *United States v. Bertolotti*, 529 F. 2d 149 (2d Cir. 1975), this Court reversed the District Court because of the fact that in a conspiracy case more than one conspiracy had been established.

In the case at bar there were obviously several conspiracies and groups of conspirators. This included not only Breindel's group, but the "Mr. White" operation;

the "Commander" operation, and the "National" operation. There was also "Esposito" and "Dixon."

The evidence adduced at trial reveals that these operations conducted separate gambling enterprises and while they may have laid off bets from time to time, there was certainly no cohesive conspiracy that linked them together.

In *United States v. Bertolotti*, 529 F. 2d at 155, this Court explained that the coincidence of certain common factors running through several disjointed conspiracies does not suffice under the *Kotteakos* rule (*Kotteakos v. United States*, 328 U. S. 750, 773-774). This Court explained, *id.*:

"Indeed, the only common factor linking the transactions was the presence of Rossi and Coraluzzo. This type of a nexus has never been held to be sufficient. *Kotteakos v. United States*, * * *."

POINT V.

THE CONJOINING OF SO MANY PEOPLE IN A SINGLE CHARGE NECESSARILY CREATED A "SPILLOVER" TYPE OF PREJUDICE WHICH DENIED A FAIR TRIAL AND DUE PROCESS TO THE APPELLANTS HEREIN.

The conjoining of so many defendants in a single trial necessarily exposed the prosecution to the problem which we have raised and it is not surprising that the

jury would have had to unravel a so-called "Chinese jigsaw puzzle" to determine who was a member of which conspiracy. The Court did not charge that if the jury found more than one conspiracy it must acquit.

This Court has recently considered the results of the Government's persistent penchant for utilizing the mass-trial format in cases such as this, where a far-flung and loosely-connected aggregation of defendants are charged with a series of transactions occurring over a protracted period of time and vast geographic expanse.

In what has become an oft-cited trilogy of cases regarding the problems of mass-conspiracy trials, this Court has repeatedly cautioned the Government that, irrespective of the conspiratorial format, where the vast and diffuse nature of defendants and transactions charged lend themselves more appropriately to subdivision of defendants into smaller, more manageable subgroups, it was incumbent upon the Government and the District Court, in the exercise of its supervisory power, in the interests both of due process and efficient judicial administration, to avoid the almost inevitable spillover prejudice that is created by trying vast numbers of loosely-connected defendants in one trial. *United States v. Sperling*, 506 F. 2d 1323 (2d Cir. 1974); *United States v. Miley*, 513 F. 2d 1191 (2d Cir. 1974); *United States v. Bertolotti*, 529 F. 2d 149 (2d Cir. 1975).

Clearly, then, this Court has admonished the Government with ever-increasing frequency that its penchant for indicting and trying a multiplicity of defendants is not merely administratively undesirable, creating unwarranted burdens at both trial and appellate levels, but raises substantial questions of prejudice to defendants' substantive and procedural rights.*

In *Krulewitch v. United States*, 336 U. S. 440, at 457, after a survey and criticism of the federal law of conspiracy, Justice Jackson declared:

"There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges * * * And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and

* Cf. *United States v. Spock*, 416 F. 2d 165, 171 n. 12:

"The occasionally asserted judicial hostility to conspiracy prosecutions * * * springs largely from the government's over-enthusiastic use of some of the procedures of conspiracy law rather than from a rejection of the public interest served by the law."

the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

(Emphasis added.)

One of Justice Jackson's criticisms of the federal law of conspiracy was that it reduced the Sixth Amendment right to trial to a sham. Referring to *Hyde v. United States*, 225 U. S. 347 (1912), he said (at 452-3):

"Mr. Justice Holmes, on behalf of himself and Justices Hughes, Lurton and Lamar, wrote a vigorous protest which did not hesitate to brand the doctrine as oppressive and as 'one of the wrongs that our forefathers meant to prevent.'"

In *Kotteakos v. United States*, 327 U. S. 750, 773 (1946), where, as here, a single conspiracy was alleged, but multiple conspiracies were proved, that Court, reversing for this reason, stated that the proceedings of a mass trial "are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass," and continued:

"* * * Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The Court in *Krulewitch* continued, explaining:

"The naive assumption that the prejudicial effects can be overcome by instructions to the jury, c.f., *Blumenthal v. United States*, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U. S. 440, 453 (1949).

"* * * the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." (L. Hand, J.) *Nash v. United States*, 54 F. 2d 1006, 1007 (CA. 2, 1932).

POINT VI.

THERE WAS INSUFFICIENT EVIDENCE TO HAVE WARRANTED SUBMITTING THE CASE TO THE JURY AS TO APPELLANTS.

Admittedly, there was no surveillances of either appellant herein. Only 28 words of a person alleged to be Iannone were recorded, and no recordings of Albahari were offered at all. Only the discredited Breindel was the fount of inculcation against either, and he was so discredited that the Court should not have permitted the case to go to the jury at all in accordance with *United States v. Taylor*, 2d Cir. 1972, 464 F. 2d 240.

Breindel could not identify Iannone at all, and had difficulty with Albahari.

POINT VII.

OTHER ERRORS: (a) THE COURT ERRED IN PERMITTING THE STRICKEN TESTIMONY OF AGENT NALLEY TO BE RE-READ DURING DELIBERATIONS; (b) THE SUMMATION OF THE PROSECUTOR WAS PREJUDICIAL IN OBLIQUELY REFERRING TO THE FAILURE OF THE APPELLANTS TO TESTIFY; (c) REFERENCE TO ORGANIZED CRIME.

During the deliberations of the jury, a request was made for the testimony of Agent Nalley. He had testified that he had heard Falco's voice over 50 times, but this had been on suppressed tapes (*United States v. Gigante, supra*). The defense sought a mistrial since the testimony in essence was the fruit of a poisonous tree.

But in the re-reading, the stricken testimony was again read and we maintain that corroborated the prosecution by illegal evidence and the Court should have granted the requested mistrial (612-13).

In his summation, the prosecution more than once adverted to the fact that the defense had not produced certain evidence such as exculpatory tapes or the like (525-531, 545).

We might mention that the Court in its charge referred to "organized crime" (561) and we submit this may well be "plain error" (Rule 52 F. R. Crim. Pro.).

CONCLUSION.

THE JUDGMENTS OF CONVICTION AS AGAINST APPELLANTS
ALBAHARI AND IANNONE SHOULD BE REVERSED.

Respectfully submitted,

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Service of ~~three (3)~~ copies of
within *Brief* is
hereby admitted this *11th* day
of *May*, 197 *7*
A. J. Jones, ALPSA
Attorney for *U.S. & A*